### UNITED STATES OF AMERICA

# BEFORE THE NATIONAL LABOR RELATIONS BOARD

# **REGION 32**

-----X

CONSTELLATION BRANDS U.S. OPERATIONS, INC. D/B/A WOODBRIDGE WINERY,

Cases: 32-CA-186265 32-CA-186238

Respondent Employer,

Sept. 2005

RESPONDENT EMPLOYER'S
BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO DECISION OF THE
ADMINISTRATIVE LAW JUDGE

CANNERY, WAREHOUSEMEN, FOOD PROCESSORS, DRIVERS AND HELPERS, LOCAL UNION NO. 601, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

----x

VS.

Charging Party.

KAUFMAN DOLOWICH & VOLUCK, LLP
MICHAEL A. KAUFMAN
MATTHEW R. CAPOBIANCO
Attorneys for Respondent Employer
CONSTELLATION BRANDS U.S. OPERATIONS, INC. d/b/a WOODBRIDGE WINERY
135 Crossways Park Drive, Suite 201

Woodbury, New York 11797 Telephone: (516) 681-1100 Facsimile: (516) 681-1101

Dated: September 21, 2018

#### INTRODUCTION

Before the Board are two separate and wholly distinct cases which were the subject of the original hearing and rehearing; respectively, Case No. 32-CA-186238 ("Cellar Lives Matter"), and Case No. 32-CA-186265 ("Short-Term Incentive Plan").

In his Decision, Administrative Law Judge Ariel L. Sotolongo (the "ALJ") incorrectly concluded that Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery ("Woodbridge") violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by: (1) directing Manuel Chavez ("Chavez") to remove his company-provided safety vest with the slogan "Cellar Lives Matter" inscribed on the back; and (2) maintaining a provision in the Employee Handbook ("Handbook") concerning eligibility for the Short-Term Incentive Plan.

The ALJ's conclusion that Woodbridge violated the Act is flawed and inconsistent with Board law. The ALJ was supposed to analyze the allegations concerning the safety vest objectively, instead, the ALJ inappropriately injected his own personal views into the Decision. It doesn't matter if he was not offended. It matters if a reasonable person would be. Similarly, the ALJ's reliance on the fact that "not a single rank-and-file employee complained about Chavez's slogan", is misplaced and confirms his subjective decision-making process. Under this logic, Woodbridge was expected to wait for employees to first complain about the racially insensitive vest or poll employees before taking any action. This is the exact sort of poor judgment by an employer that the Board and nearly every court in this Country condemns. It's ironic and simply nonsensical that Woodbridge is now being punished because they proactively addressed a racially sensitive issue in the workplace.

Second, Woodbridge's Short-Term Incentive Plan is facially neutral and only applicable at its non-union facilities. Woodbridge's policy could not and has not been "reasonably

construed" by any employee to prohibit Section 7 rights. <u>All</u> employees in the now debunk petitioned-for unit were eligible and received the bonus program, including Chavez.

Further, at the time of hire, each employee received, acknowledged, and signed a supplemental new hire document ("NHD") outlining their compensation, which included a detailed description of the Short-Term Incentive Plan. The NHD makes no mention of union or non-union eligibility, but instead, conveys the unambiguous message that all new hires, regardless of union affiliation, are eligible for the Short-Term Incentive Plan. The ALJ overlooked this fact in his Decision.

Lastly, the ALJ's decision to implement a nation-wide remedy at all of Constellation's facilities in the United States where the Short-Term Incentive Plan is maintained is inappropriate and unprecedented. If the Board upholds the ALJ's conclusion concerning Woodbridge's Short-Term Incentive Plan, the Board should order appropriate remediations at Woodbridge's Acampo, California facility only.

In sum, Woodbridge did not violate the Act. Accordingly, the ALJ's Decision should be vacated, and both Charges should be dismissed, with prejudice.

## PROCEDURAL HISTORY<sup>1</sup>

On May 3-4, 2017, the ALJ conducted a hearing. The original hearing encompassed both of the above-mentioned Charges. On December 15, 2017, the ALJ requested that Woodbridge

<sup>&</sup>lt;sup>1</sup> By way of background, on September 2, 2014, the Union filed a Petition for Representation with Region 32 pursuant to Section 9(c) of the Act. On September 10, 11, 15, 16, and 17, 2014, a hearing officer in the Board's Region 32 office conducted a hearing. On January 8, 2015, the Regional Director issued the Decision and Direction of Election. After Woodbridge's Request to Review the Regional Director's Decision was denied, the Board ordered an election, and the unit voted 31-13 to unionize. On July 31, 2015, Woodbridge filed a Petition for Review with The United States Court of Appeals for the Second Circuit. On November 21, 2016, the Court granted Woodbridge's Petition for Review and remanded the case back to the Board for further proceedings because the Board and the Regional Director both failed to apply step-one of the *Specialty Healthcare* analysis. Thereafter, a hearing was conducted, and during the hearing the Union withdrew their Petition.

and Local Union No. 601 (the "Union") submit statements of position regarding the need to reopen the record to introduce additional evidence in light of the Board's decision in *The Boeing Co.*, 365 NLRB No. 156 (Dec. 14, 2017).<sup>2</sup> On January 12, 2018, ALJ Sotolongo issued an Order reopening the record.<sup>3</sup>

On April 26, 2018, the Board conducted the rehearing strictly with respect to Woodbridge's Handbook policies.<sup>4</sup> At the rehearing, evidence was introduced by Woodbridge establishing that Woodbridge's Short-Term Incentive Plan did not violate the employees' Section 7 rights. Notably, no testimony was entered by the Union or the General Counsel on this issue. Following the hearing, on May 1, 2018, the Union announced their withdrawal as the petitioned-for unit's bargaining representative.

On August 10, 2018, the ALJ issued a joint Decision concerning both of the above-referenced Charges. Accordingly, Respondent respectfully submits the instant brief in support of its exceptions to the ALJ's Decision.

## RELEVANT FACTS

Constellation owns and operates Woodbridge Winery in Acampo, California. Woodbridge employs approximately 300 employees at its facility. Constellation Brands is an international producer of wine, beer and spirits, and the largest beer import company in the United States. Prior to September 2014, no union presence existed at Woodbridge's Acampo, California facility.

<sup>&</sup>lt;sup>2</sup> On January 3, 2018, the Union announced their withdrawal of the allegation pertaining to Woodbridge's Employee Endorsements/Required Disclaimers policy.

<sup>&</sup>lt;sup>3</sup> Following the ALJ's Order, the Region announced their decision to withdraw the charge regarding Woodbridge's Use of Recording Devices.

<sup>&</sup>lt;sup>4</sup> The NLRB Charge concerning Chavez and "Cellar Lives Matter" was not a subject at the rehearing.

The Union filed over ten frivolous charges against Constellation which were all withdrawn. These were the only two allegations that were not dropped and that have led to a Board hearing.

# I. <u>Safety Vest - "Cellar Lives Matter"</u>

Chavez was a senior operator in Woodbridge's cellar department. (TR, Page 30, Line 24). He was employed in this capacity since February 7, 2011. (TR, Page 30, Line 12). On or about August 1, 2016, Woodbridge became aware that Chavez inscribed the inflammatory slogan "Cellar Lives Matter" in black permanent marker on the back of his company-owned safety vest. Chavez claims he first began wearing the safety vest on July 20, 2016. (TR, Page 52, Lines 7-10).

On August 1<sup>st</sup>, Chavez had a payroll meeting with Normalinda Cantu ("Cantu"), the human resources manager, and Jerry Ramos ("Ramos"), the cellar supervisor. (TR, Page 269, Lines 11-13). When Chavez exited the meeting, Cantu noticed that Chavez's safety vest had the words "Cellar Lives Matter" written across the back. Cantu was shocked and offended by Chavez's vest as it seemed to mock the controversial and sensitive "Black Lives Matter" movement. Canto was also concerned this would offend Kaz Barney ("Barney"), an African American employee, who worked alongside Chavez in the same department on the same shift. (TR, Page 269, Lines 24-24); (TR, Page 270, Lines 1-2); (TR, Page 271, Lines 18-22).

Thereafter, Cantu reported Chavez's vest to Jeff Moeckly ("Moeckly"), the senior manager of cellar operations, who was similarly disgusted by the safety vest's racial message

<sup>&</sup>lt;sup>5</sup> Notably, the only witness that claims Chavez wore the safety vest for two full weeks was Chavez. No one else was able to confirm that he wore the safety vest during the two week period that Chavez alleged. The Union did not put on any other witnesses to confirm any of Chavez' testimony. The Employer put forth three witnesses and all three were offended by the safety vest.

(TR, Page 176, Lines 1-2). Contrary to Chavez's allegations, this was the first time Moeckly became aware of the safety vest. Thereafter, Moeckly planned on speaking with Angela Schultz ("Schultz"), the human resources manager, regarding Chavez's safety vest, but got caught up on other pressing matters. (TR, Page 254, Lines 15-20). Specifically, during that time, Moeckly was in and out of work caring for his mother who was dealing with an abusive relationship, going to the hospital with her and trying to find her a place to live. (TR, Pages 255, Lines 1-6). It was also harvest season or "crush," which is the busiest time of the year. (TR, Pages 254, Lines 21-25). Woodbridge bottles nearly 25 million cases per year, and during crush Moeckly's department doubles in size and this is the department responsible for offloading the grapes and crushing them into juice. Shockingly, Moeckly's candid explanation for why he did not *immediately* report the offensive vest to Schultz was seen as "disingenuous" by the ALJ. (JD at 12, fn.27).

At the conclusion of the meeting with Chavez, Cantu spoke with Schultz to discuss her concerns. (TR, Page 267, Lines 8-12); (TR, Page 269, Lines 5-8). In response to Cantu's concerns, Schultz stated "this is very concerning, and talking I think pretty insensitive on Manuel's part." (TR, Page 270, Lines 4-5). Schultz shared Cantu's concern regarding Barney, and how he (as well as other employees) could be offended by Chavez's safety vest. (TR, Page 271, Lines 18-21). Due to the sensitivity of the incident, Schultz immediately reported it to Josh Schulze ("Schulze"), the General Manager. Thereafter, Schultz and Schulze telephoned Greg Gratteau ("Gratteau"), the vice president, human resources – US Wine & Spirits. During their conversation, Gratteau stated that he was "shocked, disappointed and concerned about the potential situation this could invite to the workplace...what was happening in the world with people shot, violent protests, we didn't want to invite that kind of unsafe situation at work." (TR, Page 278, Lines 10-16).

On August 4, 2016, Schultz and Schulze met with Chavez. (TR, Page 283, Lines 20-22). During the meeting, both Schultz and Schulze explained to Chavez that his safety vest *could be* perceived as offensive, threatening, intimidating, and had the potential to incite violence in the workplace. (TR Page 19, Lines 7-9). Chavez admitted "ripping off" Cellar Lives Matter from the Black Lives Matter slogan. (TR, Page 285, Lines 13-16). Although Chavez indicated that he had no bad intentions, which is immaterial, he clearly understood Woodbridge's concern and emphasized with the police shootings. "Schultz added that Chavez said he 'understood' how his slogan could be sensitive." (JD at 8:31). Though Chavez's actions potentially rose to the level warranting discipline, he was not reprimanded. In fact, Woodbridge agreed to provide Chavez with a replacement safety vest at no cost to him.

Woodbridge's requirement that Chavez remove his racially inflammatory safety vest was reasonable, made in good judgment, and was not in violation of Chavez's Section 7 rights.

# II. Short-Term Incentive Plan

The Union also charged that Woodbridge violated the Act because employees in the then petitioned-for unit were allegedly excluded from the Short-Term Incentive Plan. Contrary to the ALJ's findings, the Short-Term Incentive Plan is available for all employees, including those affiliated with a union. Said policy has been in place for years, well before there was union organizing at Woodbridge's Acampo, California facility. Further, employees at Constellation's unionized facilities receive compensation and benefits pursuant to the terms and conditions expressly bargained for in their CBAs.

At the time of hire, every employee signs the NHD which outlines the Company Short-Term Incentive Plan. (TR, Page 339, Lines 3-6); Transcript Exhibit R-1, R-2. The NHD makes <u>no</u> mention of union or non-union eligibility, but instead, conveys the clear message that <u>all</u> new hires, regardless of union affiliation, are eligible for the Short-Term Incentive Plan. Further, and as indicated on page 6 of the Handbook, supplemental documents, including the NHD, trumps language and policies contained within the Handbook. Specifically, the Handbook states in relevant part:

Some of the subjects described here are covered in greater detail in separate policy statements and plan documents. Employees should refer to those policy statement and plan documents for specific information, since this handbook only briefly summaries those policies and benefits. In the event of any contradiction between this handbook and an applicable policy statement or plan document, the policy statement or plan document controls

There is also a similar disclaimer on the Handbook receipt.<sup>6</sup> Therefore, employees are instructed to disregard conflicting language in the Handbook, if the language in the Handbook runs afoul to the language contained within the NHD. This alone negates the ALJ's reasoning that Woodbridge violated the Act, and establishes that <u>all</u> employees, union or non-union, are eligible for the Short-Term Incentive Plan.

In addition, at Constellation's union facilities, Mission Bell and Dunnewood, a different handbook and NHD is distributed to its employees. *See* Respondent's R-3, R-4. During the hearing and rehearing, neither the General Counsel nor the Union presented any testimony from an employee establishing that they felt this language was discriminatory or that they were concerned if a union was brought in they would not receive this benefit. There is simply no evidence to support the ALJ's findings that Woodbridge's Short-Term Incentive Plan is unlawful.

<sup>&</sup>lt;sup>6</sup> "I further understand that some of the statements in this Handbook are summaries of more detailed policies, and that it is my responsibility to read and familiarize myself with the full policies, as referenced in the Handbook."

### LEGAL ARGUMENT

# I. THE ALJ ERRED IN FINDING THAT WOODBRIDGE VIOLATED THE ACT BY INSTRUCTING CHAVEZ TO REMOVE HIS RACIALLY INSENSITIVE VEST

Woodbridge was legally justified in requiring Chavez to remove his racially inflammatory vest. The ALJ's conclusion that Chavez was engaged in protected concerted activity is erroneous. (JD at 10:35-36). Due to the potential harm the message could cause (and did cause) employees, coupled with the inherently inflammatory nature of the racially insensitive copycat slogan "Cellar Lives Matter," Chavez's vest did not constitute protected concerted activity within the meaning of the Act.

As stated above, the ALJ incorrectly harps on the premise that other "rank and file" employees did not complain about Chavez's vest. (JD at 11:24-25). Apparently, the complaints raised by both management and human resources personnel regarding Chavez's vest are irrelevant. Oddly, Woodbridge is now guilty of proactively addressing a workplace issue where numerous individuals complained. The inferred logic by the ALJ that Woodbridge should have waited for a "rank and file" employee to first file a complaint or poll the employees before acting is ludicrous. Surely one could imagine a discrimination and/or hostile work environment claim arising out of Chavez's safety vest had Woodbridge decided not to promptly address internal complaints.

What's even more shocking is the fact that the ALJ concluded that "Chavez's slogan was not obscene or vulgar, nor in any way appealed to ethnic or racial prejudice." (JD at 12:24-25). Though this may very well be the ALJ's opinion, his subjective belief concerning the slogan's message cannot substitute the reasonable person/objective standard. Notably, both Chavez and

According to blacklivesmatter.com, "BlackLivesMatter was created in 2012 after Trayvon Martin's assailant, George Zimmerman, was found not guilty. It's hard to imagine that Chavez's slogan was not tied, in some way, to ethnic or racial prejudices.

the ALJ agree that the slogan could be problematic for an employer. (JD at 13:17-18).8 Despite said noted concessions from the ALJ, Chavez, Shulze, Schultz, Cantu and Moeckly that the slogan "cellar lives matter" could be "sensitive," "racially motivated", "arguably controversial9," "highly improper," the ALJ nevertheless concluded that Woodbridge's request that Chavez remove his safety vest was improper and in violation of Section 8(a)(1) of the Act.

In further support of his position, the ALJ claims that no "special circumstances" exist in the case warranting Woodbridge's request to have Chavez remove his vest. (JD at 12:24). This is also somewhat shocking. In his Decision, the ALJ seeks to distinguish Chavez from Komatsu America Corp., 342 N.L.R.B. 649, 650 (2004) and Southwestern Bell Telephone Co., 200 N.L.R.B. 667 (1972). In both cases, the Board held that "special circumstances" existed warranting the employer's request that an employee remove certain apparel. In Komatsu, the Board stated in relevant part, "special circumstances justify the proscription of union slogans or apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension..." Komatsu at 650.

Here, the ALJ improperly implanted his personal views into the Decision. In doing so, the ALJ effectively sends the message that his viewpoint regarding the slogan trumps that of Shulze, Schultz, Cantu, Moeckly, and all other reasonable people who deemed it offensive. This is entirely inapposite of the objective and/or reasonable person criterion. Theoretically, had another ALJ written the Decision, one who felt that Chavez's vest was offensive, one could

<sup>&</sup>lt;sup>8</sup> Chavez's mocking of the Black Lives Matter slogan is not unique. In fact, since its inception, numerous other groups or individuals have mimicked the slogan. For example, "All Lives Matter," "Unborn Lives Matter," and "Drunk Lives Matter" were copycat slogans that have been found to be offensive by the Black Lives Matter Movement and others. As a result, the organizations who copied the Black Lives Matter slogan have ceased and desisted from further use.

<sup>&</sup>lt;sup>9</sup> In his Decision, the ALJ states multiple times that the Cellar Lives Matter slogan is "arguably controversial." JD at 13:17-18. The ALJ further stated that the Black Lives Matter slogan was also arguably controversial. *Id.* at 13:18-19. If the underlying slogan is admittedly controversial, how is it that a derivative mocking it is not? Hence, the ALJ's reasoning is inherently flawed. p

imagine a completely different result. Regardless, the standard must be that of a reasonable person.

Accordingly, the ALJ's finding that Woodbridge violated the Act by requiring Chavez to remove his vest must be reversed, and the Charge should be dismissed in its entirety.

II. THE ALJ'S CONCLUSION THAT WOODBRIDGE'S SHORT-TERM INCENTIVE PLAN IS NOT FACIALLY NEUTRAL, OR IN THE ALTERNATIVE, CAN BE REASONABLY CONSTRUED TO RESTRICT EMPLOYEES' SECTION 7 RIGHTS, IS UNTENABLE

Woodbridge's Short-Term Incentive Plan does not unlawfully restrict employees' Section 7 rights. Contrary to the Union and the ALJ's position, the bonus plan in question applies to all non-union employees throughout Constellation's facilities in the United States, including non-union employees at a unionized facility. In support of his position, the ALJ contends that Woodbridge's Handbook language sends the message that those affiliated with a union are not entitled to the Short-Term Incentive Plan and this not factually neutral. This is untrue for two main reasons.

First, the "message" that the ALJ contends is conveyed to union employees is directly contradicted by the reality at Woodbridge. Specifically, all employees have been receiving, and continue to receive, this benefit since the Union was certified by the Board in 2015. Second, no prior charges concerning the Short-Term Incentive Plan have ever been filed, including internally (at Woodbridge's facility) or at the Region. Certainly, if those represented by the Union truly believed that they were ineligible for the bonus, a complaint would have been raised by one of the forty plus individuals in the now debunked unit. Therefore, the contention that Woodbridge's union affiliated employees *reasonably believed* they were ineligible for the bonus that all of them received subsequent to the union's presence, is nonsensical. This frivolous Charge was part of the Union's harassment of Woodbridge and was just one of many charges the

Union threw against the wall to see if it would stick. Notably, over ten of these harassing charges were either not pursued or withdrawn by the Union or General Counsel.

Further, even if the Short-Term Incentive Plan did convey the message that union employees were not entitled to the bonus, the NHD's language certainly overrides and replaces said language. As discussed above, the Handbook clearly states that "[i]n the event of any contradiction between this handbook and an applicable policy statement or plan document (i.e. the NHD), the policy statement or plan document control." Again, in the NHD, the message is clear, <u>ALL</u> employees are eligible for the Short-Terms Incentive Plan, including all individuals in the previously petitioned-for group.

There is simply no basis for the ALJ's conclusion that Woodbridge's Short-Term Incentive Plan violates the Act. As such, the board should reverse the ALJ's Decision and dismiss the Charge in its entirety.

# III. THE ALJ'S NATION-WIDE REMEDY IS INAPPROPRIATE AND INCONSISTENT WITH BOARD PRECEDENT

If the Board concludes, despite all of Woodbridge's proffered evidence and witness testimony, that its Short-Term Incentive Plan is in violation of the Act, the Board's remedy should be strictly limited to Woodbridge's Acampo, California facility.

As discussed in Woodbridge's post hearing brief, a normal Board remedy requires the employer to rescind the unlawful policy and post notice at the facility where violations of the Act were allegedly committed. *Overnite transportation company*, 1999 NLRB LEXIS 109 (1999). Requiring a respondent-employer to rescind a policy and post a notice on a "nationwide" basis is considered an "extraordinary remedy." *Id*.

Here, the ALJ erroneously concluded that Woodbridge's Short-Term Incentive Plan is in violation of the Act because it apparently conveys the message that union employees are

ineligible for the bonus. Notwithstanding Woodbridge's position, which has been well-

articulated supra, the ALJ's drastic remedy requiring rescission at of Constellation's facilities is

unprecedented and illogical especially given the fact that each facility operates independently.

Moreover, several other Constellation-owned facilities, including Mission Bell and Dunnewood.

have unionized workforces whereby collective bargaining agreements are maintained, and the

Union workers did not negotiate to keep the Short-Term Incentive Plan.

In sum, the events leading up to the Charge undoubtedly revolved exclusively around

Woodbridge's Acampo facility. The policy is question was developed years ago and has been in

place without issue ever since. Ordering a nation-wide remedy for no other reason than the mere

fact that other facilities are owned by Constellation is inappropriate and inconsistent with long-

standing Board precedent favoring remediations at the charged location. Consequently, the

Board's remedy concerning the Handbook policy should be limited strictly to Woodbridge's

Acampo, California facility.

CONCLUSION

For the foregoing reasons, the Board should find merit to Woodbridge's exceptions

herein, and reverse the ALJ's finding that Woodbridge violation the Act. Accordingly,

Woodbridge respectfully requests that the Board dismiss the above-referenced Charges in their

entirety.

Respectfully submitted,

KAUFMAN DOLOWICH & VOLUCK, LLP

Michael A. Kaufman, Esq.

Matthew R. Capobianco, Esq.

Attorneys for Respondent Employer

DATED: September 21, 2018

12

## STATEMENT OF SERVICE

I hereby certify and declare under penalty of perjury, under the laws of the United States of America and the State of California, that a copy of the RESPONDENT EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE was served today, September 21, 2018, on the following parties or persons via Facsimile and Federal Express:

> Gary Shinners **Executive Secretary** National Labor Relations Board 1015 Half Street S.E. Washington, D.C. 20570 Fax: (202) 273-4270

Ken Ko, Esq. Lelia Gomez, Esq. National Labor Relations Board Region 32 1301 Clay Street Room 300-N Oakland, CA 94612 Phone: (510) 637-3300 Fax: (510) 637-3315

On behalf of General Counsel for Region 32

Robert Bonsall, Esq. Stephanie Platenkamp, Esq. Beeson Tayer & Bodine, APC 520 Capitol Mall, Suite 300 Sacramento, CA 95814 Phone: (916) 325-2100 Fax: (916) 325-2120

Counsel of Record for Local Union No. 601

KAUFMAN DOLOWICH & VOLUCK, LLP

By:

Michael A. Kaufman, Esq. Matthew R. Capobianco, Esq.

135 Crossways Park Drive, Suite 201

Woodbury, NY 11797 Phone: (516) 681-1100

Fax: (516) 681-1101

Attorneys for Respondent Employer